

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

-----X
XL SPECIALTY INSURANCE COMPANY, :

Plaintiff, :

v. :

No. 08-CV-3821 (GEL.)

JOHN D. AGOGLIA, PHILLIP R. BENNETT, :
LEO R. BREITMAN, EDWIN L. COX, :
SUKHMEET DHILLON, THOMAS H. :
DITTMER, NATHAN GANTCHER, STEPHEN :
GRADY, TONE GRANT, THOMAS HACKL, :
DAVID V. HARKINS, SCOTT L. JAECKEL, :
DENNIS A. KLEJNA, THOMAS H. LEE, :
ERIC G. LIPOFF, SANTO C. MAGGIO, :
PETER MCCARTHY, JOSEPH I. MURPHY, :
FRANK MUTTERER, RONALD I. O'KELLEY, :
RICHARD N. OUTRIDGE, SCOTT A. :
SCHOEN, WILLIAM M. SEXTON, GERALD :
SHERER, PHILIP SILVERMAN, AND :
ROBERT C. TROSTEN, :

Defendants. :
-----X

Sworn Response Declaration of Henry Toolan

Henry Toolan, being duly sworn, deposes and says:

1. I am an underwriter for XL Specialty Insurance Company ("XL"). I make this response declaration, on personal knowledge, to bring before the Court certain additional documents and facts relevant to XL's motion for summary judgment in the above captioned case.

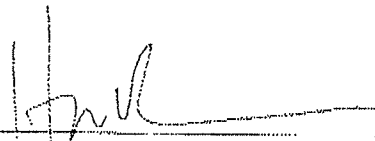
2. I was the underwriter at XL primarily responsible for the underwriting of the directors and officers management liability insurance policy number ELU089673-05 issued to Refco Inc. ("Refco") for the period of August 11, 2005 to August 11, 2006, titled "Classic A-Side Policy" (the "XL Policy").

3. Attached hereto as Exhibit D is an August 10, 2005 email exchange (at 3:23 PM) between me and Kenny Li ("Li") of Marsh USA Inc. ("Marsh"). Li was the person at Marsh responsible for the Refco insurance program. In that email exchange, titled "Fw: REFCO", Marsh indicated "[p]lease send me the application you need. Per our conversation, the warranty will be crossed off due to your endorsement." In addition, Li's email to me forwarded an email exchange between Li and Pamela Sylwestrzak ("Sylwestrzak"), Senior Vice President of Marsh and supervisor to Li on the Refco account. In her email Sylwestrzak writes: "[c]ould you send me the app that XL requires be completed. I am assuming we can cross off the warranty since they are using an inverted warranty - please confirm." This further illustrates it was agreed that the Inverted Representation Endorsement ("IRE") was part of the Policy to be issued.

4. Attached hereto as Exhibit E is an August 9, 2005 email exchange (at 4:46 PM) between me and Li, of Marsh, titled "RE: Refco - request" which gives further context to one of the emails attached to my July 10, 2008 Declaration..

5. To the extent that the only binder issued by XL did not include a reference to the IRE, it was an inadvertent mistake.

Pursuant to section 1746 of the United States Code, I declare under penalty of perjury that the foregoing is true and correct. Executed on August 14 2008.


Henry Toolan

Toolan Hank

From: KENNY.LI@marsh.com
Sent: Wednesday, August 10, 2005 3:23 PM
To: Hank.Toolan@xlgroup.com
Cc: Pamela.Sylwestrzak@marsh.com
Subject: Fw: REFCO

Hi Hank.

Please send me the application you need. Per our conversation, the warranty will be crossed off due to your endorsement.

kl

Kenny Li
Marsh USA Inc.
Private Equity and Mergers & Acquisitions Svcs.
1166 Avenue of the Americas - 38th Floor
New York, NY 10036
Phone: 212-345-1989 Fax: 212-345-8491
Email: Kenny.Li@marsh.com

----- Forwarded by Kenny Li/NYC-NY/US/Marsh/MMC on 08/10/2005 03:22 PM

Pamela M
Sylwestrzak/CHI-I
L/US/Marsh/MMC

08/10/2005 03:21
PM

Kenny Li/NYC-NY/US/Marsh/MMC@MMC

To

cc

Subject

REFCO

Kenny:

Could you send me the app that XL requires be completed. I'm assuming we can cross off the warranty since they are using an inverted warranty - please confirm.

Pam Sylwestrzak
Senior Vice President
Marsh USA, Inc.
500 West Monroe
Chicago, IL 60661
Phone (312)627-6215
Fax (312)627-6272
email: pamela.sylwestrzak@marsh.com

Toolan Hank

From: Toolan Hank
Sent: Tuesday, August 09, 2005 4:46 PM
To: 'KENNY.LI@marsh.com'
Subject: RE: Refco - requests



Classic form.pdf (53 KB)



asset threshold in merger _fil...



Clarify Indem & Othr Ins Provi...



non-rescindable und eranycircums...



P&P Lit standard 8314..pdf (58...



Prior Acts - Preferred 8308.do...



SPECIFIED CLAIMS EXCLUSION 830...



SPECIFIED ACTS
EXCLUSION 8325....

It looks like the controlling shareholder endorsement would have to be
manuscripted (or I just can't find it right now). But the intent is to match the
underlying.

Hank

-----Original Message-----

From: KENNY.LI@marsh.com [mailto:KENNY.LI@marsh.com]
Sent: Tuesday, August 09, 2005 4:31 PM
Subject: Fw: Refco - requests

Please see below from AXIS. Kindly send your revised quote if you have not done so
already. In addition, I need a copy of your form and all endorsements.

Thanks!

kl

Kenny Li
Marsh USA Inc.
Private Equity and Mergers & Acquisitions Svcs.
1166 Avenue of the Americas - 38th Floor
New York, NY 10036
Phone: 212-345-1989 Fax: 212-345-6491
Email: Kenny.Li@marsh.com

----- Forwarded by Kenny Li/NYC-NY/US/Marsh/MMC on 08/09/2005 04:29 PM

sean.lukac@axisca
pital.com@Interne
t

08/09/2005 02:02
PM

To
Kenny Li/NYC-NY/US/Marsh/MMC@MMC

cc
Pamela M
Sylwestrzak/CHI-IL/US/Marsh/MMC@MMC
, Brad
Kotlewski/NYC-NY/US/Marsh/MMC@MMC

Subject
RE: Refco - requests

Kenny.

Here you go.

Sean P. Lukac
Financial Institutions Group
Axis U.S. Insurance
430 Park Avenue, 3rd floor
New York, NY 10022
212.500.7737 (tel)
212.500.7573 (fax)

-----Original Message-----

From: KENNY.LI@marsh.com [mailto:KENNY.LI@marsh.com]
Sent: Tuesday, August 09, 2005 1:13 PM
To: Lukac, Sean
Cc: Pamela.Sylwestrzak@marsh.com; Brad.Kotlewski@marsh.com
Subject: Refco - requests

Sean,

Can you resend the Cargill questions that you requested the client to answer? Is it possible to send a revised quote with the IL amendatories and policy form number? Please clarify if you are charging for TRIA.

Thanks,
KL

Kenny Li
Marsh USA Inc.
Private Equity and Mergers & Acquisitions Svcs.
1166 Avenue of the Americas - 38th Floor
New York, NY 10036
Phone: 212-345-1989 Fax: 212-345-8491
Email: Kenny.Li@marsh.com

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager.

(See attached file: Refco-XsD&O-QL.doc)

To: Kenny Li/NYC-NY/US/Marsh/MMC@MMC
cc: Pamela M Sylwestrzak/CHI-IL/US/Marsh/MMC@MMC, Brad
Kotlewski/NYC-NY/US/Marsh/MMC@MMC
From: sean.lukac@axiscapital.com@Internet